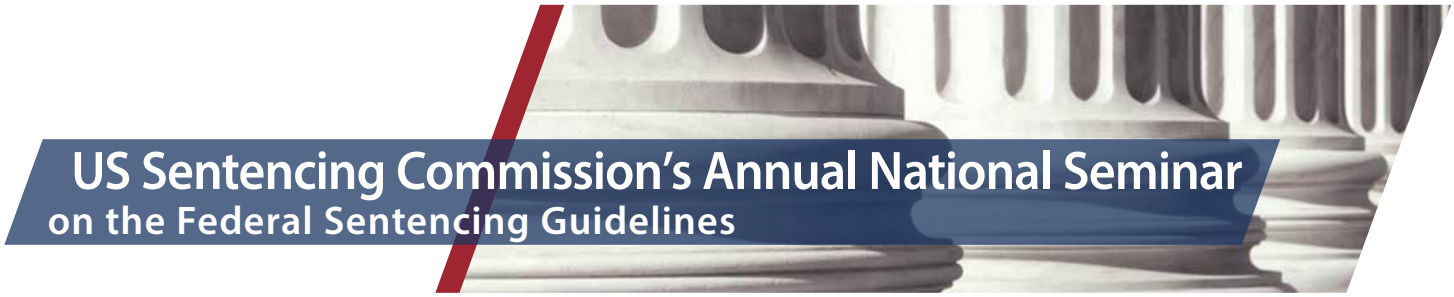

US Sentencing Commission's Annual National Seminar
on the Federal Sentencing Guidelines

2018

National Seminar

Categorical Answers

CATEGORICAL SCENARIOS

Question 1

The defendant has a prior conviction for West Virginia Code § 61-2-9(a) which provides:

If any person maliciously shoots, stabs, cuts or wounds any person, or by any means causes him or her bodily injury with intent to maim, disfigure, disable or kill, he or she … is guilty of a felony and shall be punished by confinement in a state correctional facility not less than two nor more than ten years.

If the act is done unlawfully, but not maliciously, with the intent aforesaid, the offender is guilty of a felony and shall either be imprisoned in a state correctional facility not less than one nor more than five years, or be confined in jail not exceeding twelve months and fined not exceeding $500.

Is this a divisible statute?

Answer:

Yes. If statutory alternatives carry different punishments, then the statute contains elements and is divisible. *See Mathis v. U.S.*, 136 S. Ct. 2243 (2016). This statute contains different penalties because one section carries a penalty of "not less than two years nor more than ten years" and another section carries a penalty of "not less than one nor more than five years. In *U.S. v. Covington*, 880 F.3d 129 (4th Cir. 2018), the Fourth Circuit, examining this statute, stated "[i]t is clear that the West Virginia statute question is divisible in that it lists two separate crimes with different elements and punishments.").

Question 2

Defendant is convicted of Indiana battery. The statute requires that the defendant intentionally use force that causes serious injury to a person. The defendant claims a light touch such as tickling another person entails force because if the tickled person twitches, falls, and strikes his head on a coffee table, the victim could suffer a serious injury.

Now that the defendant has described a scenario under the statute that does not involve "the amount of force" required under Johnson, is this offense no longer a crime of violence under the force clause at §4B1.2?

Answer:

No. When determining the minimum conduct required for a conviction, circuit courts have required that "such conduct only include that in which there is a realistic probability, not a theoretical possibility the state statute would apply." *See U.S. v. Ontiveros*, 875 F.3d 533 (10th Cir. 2017). To prove that the conduct is not violent and realistic, a defendant must "point to his own case or other cases in which the . . . courts in fact did apply the statute in the manner for

which he argues." *See U.S. v. Hill*, 890 F.3d 51 (2d Cir. 2018). Here, the defendant would have to show that a defendant had been convicted of Indiana battery with this set of circumstances.

Question 3

The defendant has a prior robbery conviction under D.C. Code § 22-3571.01. The statute provides:

Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than 2 years nor more than 15 years.

The government alleges that this offense is a crime of violence under §4B1.2 because it meets the generic definition of robbery. The circuit has defined generic robbery as:

Property to be taken from a person or a person's presence by means of force or putting in fear.

Does D.C. robbery match the generic definition of robbery in this circuit?

Answer:

No. In this circuit, the generic definition of robbery requires that a defendant take property from a person or person's presence by means of force or putting in fear. The D.C. robbery statute can be violated without force or putting in fear because the statute includes "sudden or stealthy seizure or snatching . . ." Thus, because someone could take a person's property by snatching it from under a table, which would not involve force or fear, the statute does not match the generic definition of robbery in this circuit.

Question 4

The defendant is convicted of felon in possession (18 U.S.C. § 922(g)) and has a prior conviction for Colorado drug trafficking under § 18-18-405(1)(a). The probation officer applies base offense level 22 at §2K2.1 because the Colorado drug trafficking offense qualifies as a controlled substance offense under the guideline.

The Colorado drug statute makes it:

unlawful for any person knowingly to manufacture, dispense, sell, or distribute, or to possess with intent to manufacture, dispense, sell or distribute, a controlled substance.

Colorado defines "sell" to mean "a barter, an exchange, or a gift, or an offer therefor."

CATEGORICAL SCENARIOS

The guidelines define "controlled substance offense" at §4B1.2 as:

the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

Does the Colorado drug statute qualify as a controlled substance offense under §4B1.2?

Answer:

No. Under §4B1.2, controlled substance does not include an offer to sell a controlled substance. Because the plain language of this Colorado statute does not require the defendant to distribute a controlled substance under the definition of sell, the Colorado statute is broader than the definition of controlled substance at §4B1.2. Assuming the statute is not divisible, it would not qualify as a controlled substance offense under §4B1.2. *See U.S. v. McKibbon*, 878 F.3d 967 (10th Cir. 2017).